Supreme Court, U. S.
FILED
MAY 22 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1468

PIETRO C. RUBINO, for himself and all other persons similarly situated; and PHILIP J. ZICHELLO,

Petitioners,

—v.—

JOHN J. GHEZZI, individually and in his capacity as Acting Secretary of State of the State of New York; *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STEPHEN GILLERS
WARNER AND GILLERS, P.C.
500 Fifth Avenue
New York, New York 10036
Attorneys for Petitioners

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Opinions Below

The opinion of the Court of Appeals for the Second Circuit, which has not yet been reported, is set forth in the Appendix, *infra*, p. 1a. The order of the District Court for the Southern District of New York, which has not been reported, is set forth in the Appendix, *infra*, p. 6a.

Jurisdiction

The decision sought to be reviewed was entered on March 3, 1975. The jurisdiction of this Court to review the judgment below is conferred by 28 U.S.C. §1254(1).

Question Presented

One question is presented. Petitioners challenge the constitutionality of New York State's law mandating the retirement of elected judges prior to the expiration of their elected term of office. Petitioners, a voter and a judge, challenge the constitutionality of this law on First and Fourteenth Amendment grounds. The issue on appeal is whether petitioners' arguments require the convention of a three-judge court.

Constitutional and Statutory Provisions Involved

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment to the United States Constitution provides in its first Section:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The New York State Constitution, Art. 6, §25, subd. b provides:

> "b. Each judge of the court of appeals, justice of the supreme court, judge of the court of claims, judge of the county court, judge of the surrogate's court, judge of the family court, judge of a court for the city of New York established pursuant to section fifteen of this article and judge of the district court shall retire on the last day of December in the year in which he reaches the age of seventy. Each such former judge of the court of appeals and justice of the supreme court may thereafter perform the duties of a justice of the supreme court, with power to hear and determine actions and proceedings, provided, however, that it shall be certificated in the manner provided by law that the services of such judge or justice are necessary to expedite the business of the court and that he is mentally and physically able and competent to perform the duties of such office. Any such certification shall be valid for a term of two years and may be extended as provided by law for additional terms of two years. A retired judge or justice shall serve no longer than until the last day of December in the year in which he reaches the age of seventy-six.

New York State Judiciary Law, §23 substantially restates this State constitutional provision.

Statement of Case

Petitioner Zichello was elected to a ten-year term as a Judge of the New York City Civil Court on November 4, 1969. Except for the challenged State statute and constitutional provision, his term would not expire until December 31, 1979. *N.Y. State Const.* Art. 6, §15. The challenged State constitutional provision, Art. 6, §25, mandates that elected judges on the following state benches retire at the end of the calendar year in which they reach the 70th anniversary of their birth: Court of Appeals, Supreme Court, County Court, Surrogate's Court, Family Court, New York City Civil and Criminal Courts and District Court.* *N.Y. Judiciary Law* §23 substantially restates this requirement.

The constitutional provision permits Court of Appeals Judges and Supreme Court Justices to "perform the duties of a justice of the supreme court" until the end of the calendar year in which they reach age 76. But it must be "certificated . . . that the services of such judge or justice are necessary to expedite the business of the court and that he is mentally and physically able and competent to perform the full duties of such office." *N. Y. State Const.*, Art. 6, §25(b). This exception does not apply to Judge Zichello, who, nevertheless, is mentally and physically able

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* Members of the Family Court in New York City and of the New York City Criminal Court are appointed by the Mayor. *N. Y. Family Court Act*, §123. *N. Y. Criminal Courts Act*, §22. The retirement provisions also apply to Court of Claims judges, who are appointed by the Governor. *N. Y. Court of Claims Act*, §2. The age limitation in New York's law apparently stems from 1822, though research indicated no express justification for it. *People ex rel. Lawrence* v. *Mann*, 97 N.Y. 530, 532 (1885).

and competent to perform his duties. There are apparently no age limits on other elected officials. In fact, in the last New York election men over 70 were elected United States Senator, Comptroller and Attorney General.

Petitioner Rubino is a voter from the district that elected Zichello. He voted for Zichello. He is over 70 years of age. He brings this action as a class action on behalf of two classes of people: (a) all eligible voters over the age of 70; and (b) all persons who voted for Zichello in 1969.

Relief Requested Below

Petitioners requested that a three-judge Court be convened and that it declare the New York State law unconstitutional only in so far as it mandates the retirement of an elected judge prior to the expiration of his elected term, solely on the basis of his reaching age 70. Zichello sought this relief in his own name. Rubino sought this relief in his own name and on behalf of all eligible voters in New York State over age 70.

Petitioners also requested an injunction against the application of these mandatory retirement provisions against Zichello. Rubino sought this relief in his own name and on behalf of all persons who voted for Zichello. Zichello sought this relief in his own name.

Action of the Lower Courts

The District Court declined to convene a three-judge Court and dismissed the action. The Circuit Court affirmed.

Basis for Federal Jurisdiction

Federal jurisdiction is based on 28 U.S.C. §§3331, 3343, and 2201 *et seq.*

Reasons for Granting the Writ

The question is whether this case is so "obviously frivolous" within the meaning of *Goosby* v. *Osser*, 409 U.S. 512, 518 (1973) that a three-judge Court must be denied. In *Goosby* this Court said that a three-judge Court may be denied only if the issue is foreclosed by previous decisions of this Court which leave no room for an inference that the questions presented can be the subject of controversy. 409 U.S. at 518.

The Circuit Court relied on this Court's affirmance in *Weisbrod* v. *Lynn*, 43 U.S.L.W. 3464 (Feb. 24, 1975) to foreclose the issues raised here. As will be shown below, *Weisbrod* involved only issues of age discrimination and did not involve First and Fourteenth Amendment rights of voters and candidates for elective office.

Since the question for this Court will be whether a three-judge Court was properly denied, the following arguments on the merits are not presented for the Court's resolution but to illustrate that the questions presented to the Courts below were not insubstantial and that, therefore, the refusal to grant a three-judge Court was error.

(a) *The State Law Violates Zichello's First Amendment Right to Seek and Hold Office.*

Zichello has a First Amendment right to be a candidate for public office and, once elected, to conclude his term. The State may limit this right only by showing a compelling State interest. There is none.

This argument depends on the existence of a constitutionally protected right to be a candidate for public office. If there is such a right, statutes affecting its exercise must

"be narrowly tailored to their legitimate objectives." *Police Department of Chicago* v. *Mosley,* 408 U.S. 92, 101 & 101 n.8 (1972). In short, two of the nonfrivolous questions this case raises are (i) whether there is a First Amendment right to be a candidate for public office, and (ii) if so, what limitations on candidacy a State may legitimately impose.

A number of lower Federal Courts have held that there is a First Amendment right to run for public office. *United Ossining Party* v. *Hayduk,* 357 F. Supp. 962 (S.D.N.Y. 1971) (3-judge Court) (alternate holding). *Mancuso* v. *Taft,* 476 F.2d 187, 195 (1st Cir. 1973). *Briscoe* v. *Kusper,* 435 F.2d 1046, 1054 (7th Cir. 1970). *Headlee* v. *Franklin County Board of Elections,* 368 F. Supp. 999, 1003 (S.D. Ohio 1973) (3-judge Court). *Blassman* v. *Markworth,* 359 F. Supp. 1, 8 (N.D. Ill. 1973) (3-judge Court) (Swygert, Ch. J. concurring).

The Supreme Court has not yet directly confronted this issue. Until recently, it has chosen to analyze the rights of candidates in terms of the rights of voters, a question also raised here and discussed later. *Bullock* v. *Carter,* 405 U.S. 134, 144 (1972). *Williams* v. *Rhodes,* 393 U.S. 23, 30-31 (1968).

Last term, in *Communist Party of Indiana* v. *Whitcomb,* 414 U.S. 441, 448-50 (1974) and in *Storer* v. *Brown,* 415 U.S. 724, 738 (1974), the Court moved away from an analysis limited solely to the effect of candidacy restrictions on voters, and indicated that candidates themselves had constitutionally protected rights. In *Whitcomb,* a political party could not gain access to the ballot in Indiana unless its officers signed an overbroad loyalty oath. The State argued that the prohibition on such oaths should "not obtain in cases of state regulation of access to the ballot." The Su-

preme Court disagreed. "At stake," it said, "are appellants' First and Fourteenth Amendment rights to associate with others for the common advancement of political beliefs and ideas. . . . Thus, burdening access to the ballot, rights of association in the political party of one's choice, interests in casting an effective vote *and in running for office* . . . is to infringe interests certainly as substantial as those in public employment, tax exemption, or the practice of law." (Emphasis added.)

In *Storer* v. *Brown, supra,* the Court had to consider among other things, ballot access limitations imposed on independent candidates rather than, as in *Williams* v. *Rhodes,* on political parties. The Court held that "the requirements for an independent attaining a place on the general election ballot can be unconstitutionally severe." It remanded the case in part to determine whether that was so. The Court did not say whether its analysis depended on the rights of voters or of candidates. It is noteworthy, though, that the limitations on access in *Storer* did not apply to parties or groups, but to particular individuals. This difference makes a strict voter-oriented analysis more difficult, if not impossible, to apply, and suggests that the Court is willing to accept a First Amendment candidate-oriented approach. *See also, Lubin* v. *Panish,* 415 U.S. 709, 716 (1974) ("The right of . . . an individual to a place on a ballot is entitled to protection. . . . ")

It is logical that candidacy be a constitutionally protected right. The First Amendment rights of speech, petition and association find their natural outlet in office seeking. It would be anomalous if a citizen has the right to speak on issues, to associate with others in an effort to cause political change, and to petition his representatives to use

their power toward a certain end, but no First Amendment right to obtain for himself the very power whose exercise he hopes to affect.

If there is a First Amendment right to be a candidate for elective office, what restrictions may the State impose on candidacy? Plaintiffs do not argue that the answer is "none." But if the right to be a candidate is constitutionally protected, limitations on it must serve some compelling State interest. This case raises the nonfrivolous issue whether a compelling State interest is served by using mandatory retirement statutes to terminate an elected official's term of office prior to its expiration.

In *Bullock,* monetary restrictions on candidacy were invalidated. *Accord, Lubin* v. *Panish,* 415 U.S. 709 (1974). In *Williams,* collection of a substantial number of signatures was held an unconstitutional burden on access to the ballot. *Accord, Storer* v. *Brown, supra.* In *Mancuso, Briscoe,* and *Headlee,* other access restrictions were invalidated. In light of these cases, it is a non-frivolous question whether age limits serve any compelling State interest justifying infringement of an elected official's First Amendment right to conclude his elected term.

(b) *The State Law Violates the First Amendment Rights of Speech, Petition and Association, and the Right to Equal Treatment of All Eligible Voters More Than 70 Years of Age, Whom Rubino Represents.*

As the Court indicated in *Bullock* v. *Carter, supra* at 142-44, limitations on access to elected office affect the rights of voters as well as of candidates. Here, New York's law affects the right to elect persons over age 60 to a full-term on a number of New York courts.

This argument is parallel to similar arguments made in *Bullock, Williams,* and *Whitcomb, supra* and in *Kusper* v. *Pontikes,* 414 U.S. 51, 56-61 (1973), *Dunn* v. *Blumstein,* 405 U.S. 330 (1972), *Cipriano* v. *City of Houma,* 395 U.S. 701 (1969), and *Kramer* v. *Union Free School District,* 395 U.S. 621 (1969).

It is important to distinguish among these cases. *Kusper, Dunn, Cipriano* and *Kramer* involved laws that, for one reason or another, prevented individuals from voting at all. In *Kusper,* a citizen was prohibited from voting in a party primary if he had voted in the primary of another party within 23 months. In *Dunn,* durational residency requirements conditioned the right to vote. In *Cipriano,* the right to vote depended on property ownership. In *Kramer,* the right to vote was conditioned on the ownership or rental of property, or the status of parenthood. In each case, the State law was declared unconstitutional. In each case except *Dunn,* the prohibition on the right to vote was partial but "permanent" for the life of the disability. For example, in *Kramer,* persons not qualifying could not vote in school district elections. In *Dunn,* the disability imposed by the residence requirement was absolute but temporary.

Williams and *Whitcomb* involved *indirect* limitations on the right to vote. In each case, access of a particular party to the State ballot was conditioned on certain factors that made access difficult or repugnant to the tenets of the party. In each case, the Court noted the effect of these hurdles not only on the party but on persons who might wish to vote for its candidates. Although these voters still retained their right to vote, the Court realistically acknowledged that limitations on ballot access necessarily limited the right to vote

as well. You can't effectively vote for someone who is not on the ballot.

Bullock v. *Carter* took this analysis a major step further. As in *Whitcomb* and *Williams,* there was no direct dilution of the right to vote (compare the reapportionment cases), nor was there a prohibition on the right to vote, either absolute and temporary (*Dunn* v. *Blumstein*) or partial and permanent (e.g., *Kramer* v. *Union Free School District*). The argument was more subtle.

Texas required candidates for the primary ballot to pay filing fees that ranged as high as $8,900. The Court said (405 U.S. at 143) that this tended to preclude "office seekers lacking both personal wealth and affluent backers . . . from seeking the nomination of their chosen party, no matter how qualified they might be, and no matter how broad or enthusiastic their popular support." The effect of this "limitation would fall more heavily on the less affluent segment of the community, whose favorites may be unable to pay the large cost required by the Texas system." 405 U.S. at 144.

Bullock is important because absent the clear party associations present in *Whitcomb* and *Williams,* the Court still recognized associational interests between economic groups. Poorer voters are inclined to vote for poorer candidates, who are seen as more nearly representative of the interests of the poorer voters.

Bullock represents a qualitative change in the analytical approach to voting cases. The Court acknowledged that, unlike *Williams* and *Whitcomb,* "disparity in voting power based on wealth cannot be described by reference to discrete and precisely defined segments of the community . . . But

we would ignore reality were we not to recognize that this system falls with unequal weight on voters, as well as candidates, according to their economic status." (*Id.*)

This Court's recognition of the subtle ways in which limitations on ballot access can affect the "fundamental" right to vote (*Harper* v. *Virginia State Board of Elections*, 383 U.S. 663 (1966)) should influence the analysis in the present case. The effect of the New York State law is to prevent older citizens from electing their own members to positions which the State has chosen to make elective. As the Court said in *Kramer, supra,* at 628-29:

> The need for exacting judicial scrutiny of statutes distributing the franchise is undiminished simply because, under a different statutory scheme, the offices subject to election might have been filled through appointment. States do have latitude in determining whether certain public officials shall be selected by election or chosen by appointment and whether various questions shall be submitted to the voters . . . However, "once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment."

Although the judiciary may be the least "representative" of the three branches of government, the State has chosen to make it elective and thereby give recognition to expressions ordinarily reflected in the vote, including choices about the maturity, frame of reference and life experience of candidates. It often happens that state courts consider issues which severely affect the rights of older persons. *See, e.g., Parrino* v. *Lindsay,* 29 N.Y.2d 30 (1971).

The willingness of this Court to consider the identity of interests between poorer candidates and poorer voters also applies here. There is a similar identity of interests between older candidates and older voters. This is not to say that there are not young candidates who will represent the interests of older citizens and old candidates who will fail to do so. But in *Bullock,* the Court also recognized that "there are doubtless some instances of candidates representing the views of voters of modest means who are able to pay the required fee." 405 U.S. at 144. Nevertheless, the Court refused to "ignore reality."

It is important to consider the size of this problem. According to the Statistical Abstract of the United States, in 1971 nearly 2 million of New York's 18 million citizens were older than 65 (p. 32). These people could not, under current law, elect one of their number to a full term on Zichello's Court (or any other court). Yet the same source says that in the United States about two out of every three people over age 65 actually vote (p. 379).

In New York, one-sixth of the eligible voters in the State (1972) were more than 65 (p. 381). One out of six voters, therefore, suffers a disability in associational and voting freedom not suffered by other voters.

In *Bullock,* the Court recognized that high filing fees will tend to exclude poorer candidates, and that this will tend to affect poorer voters. Here, we are not dealing with a tendency. We have an outright exclusion, and more. We have a requirement that duly elected persons leave office even prior to the expiration of their elected term.

Petitioners respectfully submit that the *Bullock* standard is this: limitations on candidacy must be weighed by refer-

ence to the State's power to impose the same disability on voters. Since, in *Bullock*, the State could not, absent a compelling interest, condition the right to vote on wealth (*Harper*), it could not indirectly compromise the right to vote on this basis by conditioning the right to be a candidate on wealth. Here, the State could not absent a compelling interest condition the right to vote on an age maximum. See *Kramer*, 395 U.S. at 626-27; *Dunn* v. *Blumstein*, *supra*; *McDonald* v. *Board of Elections*, 394 U.S. 802, 806-07 (1969); *Goosby* v. *Osser*, 409 U.S. at 519-20; *Evans* v. *Cornman*, 398 U.S. 420 (1970). Neither may it compromise the right to vote on this basis by creating an age maximum on the right to be a candidate.

This argument is not novel. It is the precise reasoning of the three-judge Court in *Human Rights Party* v. *Secretary of State for Michigan*, 370 F. Supp. 921 (E.D. Mich. 1973). There, a State law prohibited persons under eighteen years of age from running for election as a member of a Board of Education. Plaintiffs endorsed the candidacy of a fifteen-year-old and challenged the State law. A three-judge Court was convened. The Court read *Bullock* this way:

> The reasoning of the *Bullock* Court leads us to the conclusion that the compelling interest standard is applicable to a statutory restriction on candidacy if that restriction has an indirect discriminatory impact of the sort which, had it resulted directly from a statute limiting the right to vote, would require application of the stricter standard of review of that statute.

In other words, because limitations on candidacy affect voters, the validity of these limitations must be weighed as though they had been applied to voters in the first place.

The Michigan Federal Court next had to consider whether *Bullock's* assumption that poorer voters are more likely to favor poorer candidates also applied to younger voters and younger candidates. The Court held that this "interest identification" did apply:

> The statute under consideration here had the indirect impact of limiting the right to vote on the basis of age since the candidates excluded are those most likely to be favored by young citizens. [Citing *Bullock* at 144.] Thus, we are brought to the question of whether a state limitation on the right to vote based on age must meet the compelling interest test in order to satisfy the requirements of the Fourteenth Amendment.

The Court, citing *Oregon* v. *Mitchell*, 400 U.S. 112 (1970), concluded that the compelling interest test was not required where the age limitation was a mandatory *minimum*. Instead, the Court applied the rational relationship test. The Court found that the State had a valid interest in "the maturity" of its office holders and in assuring that school board members will have "the legal capacity to transact the business of the Board."

Petitioners respectfully suggest that the Michigan Court's analysis must in part be applied here. The Court must recognize the indirect impact of the retirement provision on voters. It must also recognize the interest identification between older voters and older candidates. The only difference between this case and the Michigan case is the appropriate test to apply.

The compelling State interest test should apply here. There is a difference between an age minimum and an age maximum. Although the State may condition the right to

vote on an age minimum without showing a compelling interest, it could not establish an age maximum absent one. This is because there are real factual differences between age minimums and age maximums. With age minimums, the State is approaching a large, undifferentiated mass of people. Practically speaking, there is no other way to assure the maturity of voters. An age minimum is not an assurance, of course, but it is the best that can be done. So the courts permit it.

An age maximum differs. A State may require a voter to be 18 years old, but it cannot exclude a voter once he is, say, 50 or 60 or 70 years old. It cannot presume the loss or disappearance of maturity for reason of age alone.

Since the compelling State interest test would have to apply to the exclusion of voters based on an age maximum, it must also apply to the exclusion of candidates. This makes perfect sense when we consider the purpose of elections. While age minimums seek to establish maturity where particularization is not feasible, the very purpose of an election is to allow the voters to make their own choice. An election provides the very opportunity for particularization that is not possible when dealing with the determination of an age minimum.

The argument that the "*Bullock* mirror" requires the same equal protection standard to be applied to candidates that would have to be applied to voters is supported by *Chimento* v. *Stark*, 353 F. Supp. 1211 (D.N.H. 1973), *aff'd* 414 U.S. 802 (1973), where the District Court applied a compelling State interest test in upholding a seven year residency requirement for gubernatorial candidates. The Court reasoned that this test was necessary because the same test would have to be applied if the limitation were im-

posed on voters. Although the outcome may differ—because a candidate is not a voter—the *test* had to be the same.

How far can states go in excluding the elderly from the political process? Does *Bullock* require Federal Courts to take consideration of the political reality of interest identification? Does the interest identification based on wealth differ in a real way from interest identification based on age? Should the compelling State interest test apply? *Bullock* raised many questions. Its ramifications will be felt for some time. The present case seeks to examine these. The argument for an extension of *Bullock*, if it is an extension, to the facts here is serious and timely. It is not frivolous. As the *Kramer* Court said, *supra* at 626:

> . . . statutes distributing the franchise constitute the foundation of our representative society. Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government.

(c) *The State Law Creates an Overbroad Generalization and an Irrebuttable Presumption That Zichello Is Unable to Exercise the Duties of His Office, in Violation of the Due Process Clause of the 14th Amendment.*

The mandatory retirement statute creates an unconstitutional irrebuttable presumption that Zichello cannot do the job to which he was elected. An irrebuttable presumption violates the Due Process Clause when it is "not necessarily or universally true in fact, and when the State has reasonable alternative means of making the crucial determination." *Vlandis* v. *Kline*, 412 U.S. 441, 452 (1973). *Accord, Cleveland Board of Education* v. *La Fleur*, 414 U.S. 632, 644 (1974). *Stanley* v. *Illinois*, 405 U.S. 645 (1972).

Bell v. *Burson*, 402 U.S. 535 (1971). *Carrington* v. *Rash*, 380 U.S. 89 (1965).

Similarly, requiring Zichello to terminate his elected office on the basis of age creates an "overbroad generalization" as constitutionally intolerable as those in *Weinberger* v. *Wiesenfeld*, —— U.S. ——, 95 S. Ct. 1225, 1231 (1975) and *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), cases not involving First Amendment rights.

La Fleur is directly in point because it invalidated an irrebuttable presumption that a pregnant teacher could not exercise her duties four or five months prior to the birth of her child. In dissent, the Chief Justice and Justice Rehnquist suggested that the use of an irrebuttable presumption test in *La Fleur* would invalidate just the sort of mandatory retirement provision challenged here.

It is not necessarily or universally true that 70-year-old judges can no longer judge. Many lawyers continue with productive work long past age 70. Further, the State itself allows some judges to continue sitting to age 76. *N. Y. State Const.* Art. 6, §25. And the State law requirement that it be certificated that these judges are still able to exercise their duties proves that there are "reasonable alternative means of making the crucial determination." *Vlandis* v. *Kline*, *supra*.

Finally, apparently no other elected officials have mandatory age limits. To the extent that all irrebuttable presumption tests border on equal protection arguments (see Powell, J., concurring in *La Fleur*), petitioners assert the lack of any rational basis to distinguish between kinds of judges, and between judges, lieutenant governors, assemblymen, comptrollers, attorneys general, etc. *Reed* v. *Reed*,

404 U.S. 71 (1971); *Whitcomb, supra,* concurring opinion; *Weiss* v. *Walsh,* 324 F. Supp. 75, 78 (S.D.N.Y. 1971), *aff'd* 461 F.2d 846 (2d Cir. 1971); *Ali* v. *Division of State Athletic Commission,* 316 F. Supp. 1246 (S.D.N.Y. 1970). *Weiss* v. *Walsh* rejected the broad argument that mandatory age limits are always a denial of equal protection to persons over the limit compared to persons under it. That argument is not made here. The arguments here are all much narrower, including the argument, recognized in *Weiss* (324 F. Supp. at 78), based on *Ali,* that different treatment to two persons, both of whom are over the age limit, may violate equal protection.

Petitioners contend that it is at least a nonfrivolous question whether the New York State law is based on an irrebuttable presumption about the capacity of a person aged 70 to continue in a judicial office, and, if so, whether that presumption may constitutionally serve to terminate his elected term prematurely on the ground that the elected official has suddenly become incapable of doing his job.

Respondents will doubtless argue that *Weisbrod* and *McIlvaine* v. *Commonwealth of Pennsylvania,* 415 U.S. 986 (1974) foreclose a Fourteenth Amendment argument, whether based on due process (including irrebuttable presumptions) or equal protection. There is, however, a crucial distinction between *Weisbrod* and *McIlvaine* on the one hand, and this case on the other.

Irrebuttable presumptions are not automatically suspect. Rather, the irrebuttable presumption must affect a constitutional right. In *La Fleur,* the Court emphasized that it was dealing with "freedom of personal choice in matters of marriage and family life . . . one of the liberties protected by the Due Process Clause of the Fourteenth Amend-

ment." 414 U.S. at 641. Accordingly, in its holding, the Court invalidated the regulations containing the presumption, not simply because there was a presumption nor even because the presumption was irrebuttable, but "because [the regulations] employ irrebuttable presumptions that unduly penalize a female teacher for deciding to bear a child." 414 U.S. at 648.

In *Weisbrod* and *McIlvaine,* the alleged irrebuttable presumptions affected only the more generalized interest in public employment. This case is closer to *La Fleur* than to *Weisbrod* and *McIlvaine.* Here, the alleged irrebuttable presumption affects the "fundamental" right to vote and, plaintiffs contend, the equally fundamental right to seek public office. These rights are protected by the First Amendment and their presence here distinguishes this case from *McIlvaine* and *Weisbrod.* An irrebuttable presumption that affects these rights should be as carefully scrutinized as one that affects the "liberty" involved in *La Fleur.*

Plaintiffs contend that these differences put this case within the ambit of the *La Fleur* rationale, that they raise nonfrivolous questions, and that they substantially distinguish *Weisbrod* and *McIlvaine.*

(d) ***The State Law Denies Zichello Equal Protection of the Laws Because It Treats Judges in Similar Situations Differently.***

The New York State Constitution makes age 70 a mandatory retirement age for all judges, but creates an exception for certain judges who may be permitted to sit for six additional years if they are "certificated" to be "mentally and physically able and competent to perform the duties of such office." Art. 6, §25, subd. b, *New York State Constitution.* This provision is substantially restated by *New York State Judiciary Law,* §115.

By granting certain elected judges the right to continue in office through age 76, while denying that right to other, similarly situated, elected judges, the New York law denies the judges in the second category the equal protection of the laws. This denial can satisfy neither the compelling state interest or the rational relationship tests. *Bullock* v. *Carter, supra; Human Rights Party* v. *Secretary of State for Michigan, supra. Cf. Murgia* v. *Commonwealth of Mass. Bd. of Retirement,* 376 F. Supp. 753 (D. Mass. 1974).

There is no valid reason for permitting one elected official to serve until age 76 and to require another to leave his post at age 70, when both do the exact same job, though on different courts. The validity of this distinction, in any event, raises non-frivolous questions under the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

WARNER AND GILLERS, P.C.
500 Fifth Avenue
New York, New York 10036
Attorneys for Petitioners

On the Petition:

STEPHEN GILLERS
ELLIOT A. TAIKEFF
KENNETH E. WARNER

Opinion of Court of Appeals, Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 511, 876—September Term, 1974.

(Argued January 22, 1975 Decided March 3, 1975.)

Docket Nos. 74-2374, 74-2435

PIETRO C. RUBINO, for himself and all other persons similarly situated; and PHILIP J. ZICHELLO,

Plaintiffs-Appellants,

HARRY T. NUSBAUM,

Plaintiff-Intervenor-Appellant,

—against—

JOHN J. GHEZZI, individually and in his capacity as Acting Secretary of State of the State of New York; et al.,

Defendants-Appellees.

Before:

LUMBARD, HAYS and MULLIGAN,

Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Hon. Thomas P. Griesa, *Judge*, denying a motion to convene a three-judge court and dismissing the complaint, which sought declaratory and injunctive relief against mandatory age restrictions upon the term of office of certain state judges.

Affirmed.

STEPHEN GILLERS, New York, New York (Elliot A. Taikeff, of Counsel), *for Plaintiffs-Appellants.*

GAINSBURG, GOTTLIEB, LEVITAN & COLE, New York, New York (Samuel Gottlieb, Alan C. Krieger, of Counsel), *for Plaintiff-Intervenor-Appellant.*

A. SETH GREENWALD, Asst. Attorney General, New York, New York (Louis J. Lefkowitz, Attorney General for the State of New York, Samuel A. Hirshowitz, First Asst. Attorney General, of Counsel), *for Defendant-Appellee Ghezzi and Attorney General, Pro se.*

WILLIAM P. DEWITT, New York, New York (Adrian P. Burke, Corporation Counsel for the City of New York), *for Defendants-Appellees Katz, Irizarry and New York City Board of Elections.*

DIKMAN & BOTTER, Jamaica, New York, *for New York City Family Court Judges' Ass'n, Amicus Curiae*

MILLER, SINGER, MICHAELSON & RAIVES, New York, New York (Alfred Miller, Stephen L. Solomon, of Counsel), *for American Ass'n of Retired Persons, Amicus Curiae.*

PER CURIAM:

Philip J. Zichello, one of the named plaintiffs in this action commenced in the United States District Court for the Southern District of New York, was a Judge of the

Civil Court of the City of New York, elected for a term which commenced on January 1, 1970. Although the normal term of office for this position is ten years, the New York State Constitution (Art. 6, § 25) and the Judiciary Law (§ 23) provide for mandatory retirement at the age of 70. Since Judge Zichello was born in 1904, his term expired under state law on the last day of December, 1974. The second named plaintiff, Pietro C. Rubino, is a voter over 70 who alleges that he voted for Zichello. The intervenor, Harry T. Nusbaum, is also a Judge of the Civil Court of the City of New York who was elected on November 4, 1969 but who will become 70 in 1978, which will result in his mandatory retirement on December 31, 1978, or one year prior to the end of the normal ten-year term. The complaint below sought preliminary and permanent injunctive relief against the enforcement of the cited state constitutional and statutory provisions as violative of the First and Fourteenth Amendments of the United States Constitution, and further sought the convening of a three-judge district court pursuant to 28 U.S.C. §§ 2281 & 2284. Rubino also sought class action treatment as the representative of all voters over 70 in the state, as well as all persons who voted for Judge Zichello. On the return day of an order to show cause, October 18, 1974, Judge Thomas P. Griesa of the United States District Court for the Southern District delivered an opinion finding that there was no substantial federal question which would justify the convening of a three-judge court and dismissed the complaint. This appeal followed.

The question before us is whether, under the rule of *Goosby* v. *Osser*, 409 U.S. 512 (1973), the district court properly determined that the constitutional grounds raised by the plaintiffs were wholly insubstantial and frivolous. We are of the opinion that the issue of age restrictions

upon the term of office of state judges is properly one for the legislative or electoral processes of the State of New York and that the effort to clothe it in constitutional garb is frivolous. We therefore affirm the dismissal of the complaint.

The cases primarily relied upon by the plaintiffs to establish the First Amendment rights of the candidate to run for office and of the voter to be free to elect aged candidates (*Williams* v. *Rhodes*, 393 U.S. 23 (1968); *Bullock* v. *Carter*, 405 U.S. 134 (1972); *Communist Party* v. *Whitcomb*, 414 U.S. 441 (1974); and *Storer* v. *Brown*, 415 U.S. 724 (1974)) all involved restrictions upon access to the ballot, which is not the issue here. The judges seeking relief here were on the ballot and no one was precluded from voting for them. Both took office for a term clearly established by the legislature and the state constitution and they are properly subject to the conditions imposed by the state upon the length of the term. *Gordon* v. *Leatherman*, 450 F.2d 562, 565 (5th Cir. 1971). We find no authority at all which would support the contention that Rubino as a citizen over 70 has any constitutional right to vote for the elderly. We do not deem age to be a suspect classification requiring any strict scrutiny of the state's scheme of age restrictions upon judicial terms of office. See *Weiss* v. *Walsh*, 324 F. Supp. 75 (S.D.N.Y. 1971), aff'd, 461 F.2d 846 (2d Cir. 1972), cert. denied, 409 U.S. 1129 (1973). It would appear that without question the state could rationally determine that, in the interests of judicial efficiency and the encouragement of younger attorneys with judicial aspirations, a mandatory age limitation of 70 for inferior court judges was reasonable.

The claim that the mandatory retirement age violates the due process and equal protection clauses is, we believe, clearly insubstantial in view of the holding of the

Supreme Court in *McIlvaine* v. *Pennsylvania*, 415 U.S. 986 (1974). The Court there dismissed, for want of a substantial federal question, an appeal from the Pennsylvania Supreme Court which upheld a state law requiring retirement of police at age 60. On the basis of that decision, a three-judge court for the District of Columbia in *Weisbrod* v. *Lynn*, 383 F. Supp. 933 (1974) dismissed a complaint which sought a declaratory judgment that the Federal Employee Mandatory Retirement Law, 5 U.S.C. § 8335, was unconstitutional because it mandates a 70-year-old retirement age for federal employees irrespective of the health or mental abilities of the employee. The court there examined the Jurisdictional Statement in *McIlvaine* and concluded, as we have here, that the issues of equal protection and due process* were before the Court in *McIlvaine*, and that the Supreme Court did not consider those issues to present a substantial federal question. An appeal was taken to the Supreme Court from the decision in *Weisbrod* and the Court affirmed the dismissal of the complaint. 43 U.S.L.W. 3464 (Feb. 24, 1975). Since the issues before us are substantially similar, if not identical, to those presented in *Weisbrod* and *McIlvaine*, we believe that the court below correctly concluded that there was no substantial federal question and properly dismissed the complaint.

Affirmed.

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* Appellants' principal due process argument is founded upon the irrebuttable presumption doctrine, *Cleveland Bd. of Educ.* v. *LaFleur*, 414 U.S. 632 (1974); *Vlandis* v. *Kline*, 412 U.S. 441 (1973), which has been said to resemble equal protection analysis, *Cleveland Bd. of Educ.* v. *LaFleur*, *supra*, 414 U.S. at 652 (Powell, *J.*, concurring in result); Note, The Irrebuttable Presumption Doctrine in the Supreme Court, 87 Harv. L. Rev. 1534 (1974). The *Weisbrod* court was faced with the same argument.

Opinion of the District Court for the Southern District of New York

[A22] The Court: Let me put my decision on the record.

This is an action brought by Philip J. Zichello, a Judge of the Civil Court in New York City, who was elected to that office on November 4, 1969, and assumed his duties on January 1, 1970.

Judge Zichello was born November 1, 1904, and will be 70 years old at the first of November of this year.

Judge Zichello seeks a declaration of the invalidity of the provision in the New York Constitution and the provision in the New York Judiciary Law providing mandatory retirement of Civil Court Judges at the age of 70.

The relevant provisions are Article VI, Section 25B of the New York Constitution and Section 23 of the New York Judiciary Law.

Judge Zichello urges that he is entitled to serve his full ten-year term as provided by another provision of the New York Constitution, Article VI, Section 15.

All of these constitutional and statutory provisions have been in effect for a number of years and were in effect at the time Judge Zichello was elected in 1969, and at the time he assumed his duties, January 1, 1970.

In addition to Judge Zichello, there is also a plaintiff by the name of Pietro C. Rubino. Mr. Rubino is a voter in the district which elected Judge Zichello. He [A23] voted for Judge Zichello. He is over 70 years of age. He brings this action on behalf of himself and in behalf of all other persons who voted for Judge Zichello in 1969 and all eligible voters in the state over the age of 70.

Judge Zichello does not attempt to represent a class. As of today, intervention was permitted to another Civil Court Judge, Harry T. Nussbaum.

The plaintiffs request the convening of a three-judge court under 28 USC Section 2281 on the ground that this is an action to enjoin a state statute.

The defendants urge that there is no substantial federal question, no substantial constitutional question, and that the three-judge court should not be convened and the action should be dismissed.

I am denying the motion to convene a three-judge court and dismissing the action.

A variety of arguments have been made to the effect that the mandatory retirement provisions under New York law applicable to the Civil Court Judges violate the United States Constitution, particularly the First and Fourteenth amendments.

I find that none of these arguments are substantial. For instance, plaintiffs argue that the 70 year retirement provision violates Judge Zichello's First Amendment right [A24] to seek and hold office. The cases cited under this heading of the argument have nothing really to do with a retirement provision.

In my view there is no case under the First Amendment which can reasonably be interpreted as preventing the State of New York from establishing terms for its elected officials, including judges, and as part of the establishment of such terms, it would seem obvious that the State may, in its Constitution and in its statutes, provide for retirement of judges at the age of 70 years.

I will not deal specifically with every single one of the constitutional arguments presented by plaintiffs. I will not deal specifically in this bench decision with each and every

such argument. I have considered the arguments and I find them without merit.

Basically, it seems to me clear that the people of the State of New York in their Constitution and the Legislature of the State of New York in its Judiciary Law have the unquestioned right to provide for mandatory retirement of judges at the age of 70. There can be no reasonable argument in my view that such constitutional and statutory provisions deprive Judge Zichello of liberty or property, or interfere with his First Amendment rights under the Federal Constitution.

There is abundant evidence, to say the least, of [A25] actions taken by administrative boards, the Congress of the United States, and state legislatures in establishing retirements for the age of 70 or ages thereabouts. There is such a body of legislative activity of this kind as to make it really impossible to say that the people of New York and the Legislature of New York were unreasonable in their mandatory retirement provisions or violated the Federal Constitution in any way.

One specific argument should be dealt with, and that is an equal protection argument relating to a differentiation in treatment as to the Civil Court Judges versus certain other judges or justices of the state.

It is provided in the case of the Judges of the New York State Court of Appeals and Justices of the Supreme Court that these two types of judges may, following the age of 70, perform the duties of a Justice of the Supreme Court provided that it shall be certificated that the services of such Judges or Justices are necessary to expedite the business of the court, and that such persons are mentally and physically able and competent to perform the full duties of such office. Service under this provision may be made

under the conditions specified until the individual reaches the age of 76.

It seems to me perfectly clear that this is not a denial of equal protection. The legislature and the people [A26] of the State of New York in their Constitution and in their Judiciary Law had a perfectly valid ground, without question, to make a minor differentiation between the two categories of judges and provide for a short additional service under certain circumstances for Court of Appeals Judges and Supreme Court Justices in the State Supreme Court.

The differentiation in treatment does not in my view in any way raise a constitutional question. It goes without saying that in my dismissal of this case and in my refusal to convene a three-judge court, I am in no way indicating any lack of sympathy with the position and views of Judge Zichello and the others who have appeared before me today and the others who are interested in this proceeding.

I know as well as anyone that men who have passed the age of 70 years can continue to perform all kinds of services, including services on the judiciary, and I know as well as anyone that blanket retirement rules can have their effects of imposing hardship in individual cases. But it is equally clear that it is my limited function to try to assess the existence or non-existence of a valid question as to whether the New York provisions violate the Federal Constitution.

I am not acting as a drafter of the New York [A27] Constitution or as a member of its Legislature, and having in mind my limited role, I can not conscientiously hold that there is any constitutional question which requires the continuation of this action and I am dismissing it.